No. 1081

IN THE

Supreme Court of the United States

October Term, 1945.

HILDA M. GLASSER, as Trustee in Bankruptcy of the Estate of HELEN RUSSELL ROGERS,
Petitioner,

AGAINST

CHARLES FRANCIS ROGERS, HELEN RUSSELL ROGERS, and HARRY N. WESSEL,
Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit and Supporting Brief.

SIDNEY S. BOBRÉ
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CASES CITED.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully presents this petition for a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Second Circuit.

Statement of Matter Involved.

Petitioner filed suit in the United States District Court for the Southern District of New York on July 11th, 1944 to set aside, as in fraud of creditors, an assignment by the bankrupt to her former husband of her remainder

interest in certain trusts created by the will of her father and to set aside a subsequent re-transfer in May, 1944 by the former husband to his attorney (R. 5, 6).

The will of the bankrupt's father was probated in a Probate Court in Connecticut and the Hartford-Connecticut Trust Company was named as trustee under that will.

The Hartford-Connecticut Trust Company was not made a party to the action in the United States District Court.

After issue was joined, the Hartford-Connecticut Trust Company instituted an interpleader suit in the Superior Court of Hartford County in Connecticut on August 18th, 1944 and joined petitioner and respondents as defendants. The plaintiff in that suit alleged that petitioner had notified it that she claimed the assignment was void as in fraud of creditors and alleged that an action was pending in the District Court between petitioner and respondents to declare the assignment fraudulent, and prayed that the defendants be required to interplead (R. 6, 13).

Petitioner is a resident of New York and was served by registered mail in New York on August 22nd, 1944 (R. 12).

On October 16th, 1944 an interlocutory judgment was made by the Connecticut Court directing that the defendants interplead and file their claims by October 20th, 1944 and appear on that day for the purpose of proving their respective claims. Notice of this was given to petitioner by the Clerk of the Connecticut Court by mail on October 16th, 1944 (R. 16).

On October 20th, 1944 petitioner's counsel appeared before the Superior Court and pointed out that in order to prove petitioner's claim, depositions would have to be taken in New York and that notice of three days was insufficient for that purpose and asked for a continuance, or, in the alternative, that the Court direct payment to the assignee and leave open the issue as to whether the as-

signment was in fraud of creditors, to be litigated in the suit then pending in the District Court. Counsel representing the respondents thereupon stated to the Superior Court that the assignee was financially responsible and worth many times the amount involved (R. 13-15).

The Connecticut Court on the same day made a final decree containing only the following adjudication:

> "that the plaintiff pay and turn over and deliver said property to the defendant Harry N. Wessel and that said plaintiff thereupon be discharged of all further liability to any and all the defendants thereto and that the plaintiff be allowed his costs of suit and the sum of two hundred ($200.) Dollars for counsel fees and disbursements payable out of said property" (R. 7, 8).

Respondents then moved for leave to set up the Connecticut judgment as a defense in bar. The District Court granted the motion and stated in its memorandum opinion:

> "Whatever be the merits or demerits of the proposed supplemental answer, this motion is granted. The validity of the judgment to be set up depends among other things on the character of the service which involves a question of fact. The moving affidavit does not state the service. The sufficiency at law of the judgment should be decided on a different motion or at the trial" (R. 17).

Respondents then moved for summary judgment dismissing the complaint on the ground that the Connecticut judgment was *res judicata* of the issues here involved.

The District Court recognized that the Connecticut action was one of interpleader and that the Supreme Court had held interpleader to be *in personam* in *New York Life*

Insurance Co. v. *Dunlevy,* 241 U. S. 518 and that the New York Court of Appeals had made a similar ruling in *Hanna* v. *Stedman,* 230 N. Y. 326. The District Court also recognized the difficulty in overcoming the effect of the *Dunlevy* case and though unable to find any contrary authority, granted the motion on the theory that this particular interpleader was *in rem* (R. 9).

The Circuit Court took the view that petitioner was mistaken as to the nature of the Connecticut action and that even though it was brought under a Statute permitting interpleader suits and though it had all of the forms of such an action, that it was not interpleader (R. 19). The District Court, the Connecticut Court, and all the parties to this action and to that action had considered the Connecticut suit to be one of interpleader.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered December 10th, 1945. By order of this Court dated March 9th, 1946 the time for filing a petition for certiorari was extended to April 9th, 1946. Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13th, 1925.

Questions Presented.

1. Whether the Connecticut interpleader action was an action *in personam* and therefore not binding on petitioner because personal service was not made on her in Connecticut.

2. Even if it is *in rem* and bars petitioner from any action against the Hartford-Connecticut Trust Company, whether it is a bar to this action to set aside the assignment as in fraud of creditors, in view of the limited ex-

tent of the adjudication in the Connecticut decree and under the application of the doctrine of *res judicata.*

3. Whether a three day notice by mail within which to file a claim and to present evidence that the assignment was in fraud of creditors, where depositions would be required, could be considered as having afforded petitioner an adequate opportunity of being heard.

4. Whether the respondents are estopped from contending that the Connecticut Court adjudicated the issues involved in this action because of their statement made to the Connecticut Court to induce that Court, we contend, to leave open these issues.

Reasons Relied on for the Allowance of the Writ.

Petitioner respectfully submits that the case calls for the exercise of this Court's power of supervision in that the decisions below are in conflict with the decision of this Court holding an interpleader action to be one *in personam,* and by the failure to apply the doctrine of *res judicata* in accordance with the decisions of this Court and the settled application of the doctrine, whereby petitioner has been deprived of an opportunity of presenting her cause of action for adjudication.

Petitioner respectfully prays that a writ of certiorari be allowed.

Dated: New York, N. Y., April ..., 1946.

HILDA M. GLASSER, as Trustee,

by SIDNEY S. BOBBÉ,
Counsel for Petitioner.

BENJAMIN LEIBOWITZ,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

HILDA M. GLASSER, as Trustee in Bankruptcy of the Estate of HELEN RUSSELL ROGERS,
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AGAINST

CHARLES FRANCIS ROGERS, HELEN RUSSELL ROGERS and HARRY N. WESSEL,
Respondents.

Brief in Support of Petition for Writ of Certiorari.

Opinions Below.

The opinion of the District Court is reported in 59 F. Supp. 986 (R. 5-10). The opinion of the Circuit Court is reported in 152 F. (2d) 428 (R. 18-21).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered December 10th, 1945 (R. 21). By order of this Court dated March 9th, 1946 the time for filing a petition for certiorari was extended to April 9th, 1946 (R. 23).

Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13th, 1925.

Statement.

A summary statement of the matter involved is set out in the petition and in the interests of brevity is not repeated here.

Summary of Argument.

The Connecticut action was in interpleader. It was brought under a Statute permitting such suits (R. 6). It was in the usual form of that type of action (R. 19). It was so considered by the Connecticut Court (R. 13, 16), by the parties, and by the District Court (R. 6). The Circuit Court seemed to have some doubt as to its nature, but there appears to be no basis for such doubt (R. 19).

An interpleader action is *in personam* as held by *New York Life Insurance Co.* v. *Dunlevy*, 241 U. S. 518 and *Hanna* v. *Stedman*, 230 N. Y. 326. No authority to the contrary was found by the District Court (R. 9). Petitioner being a resident of New York and served by mail in New York, the Connecticut decree is not binding on her. This interpleader action cannot be distinguished from others on the ground taken by the Courts below that there was a *res* in the hands of the plaintiff and under the Court's control because that is true of every interpleader action. Whether an action is *in rem* or *in personam* depends on the nature of the action. A *rem* action requires a *res*, but the existence of a *res* will not make it one *in rem*. The identical *res* that makes a garnishee action one *in rem* under the rule of *Harris* v. *Balk*, 198 U. S. 215 does not make the interpleader action one *in rem*, which was the specific holding in *New York Life Insurance Co.* v. *Dunlevy*, 241 U. S. 518.

Under the doctrine of *res judicata* the Connecticut decree, even if the Court had jurisdiction over the person, would not be *res judicata* of the issues here involved because the causes of action are different and the decree is limited to the precise point determined and the Connecticut Court made no attempt to determine the issues involved in this suit.

The petitioner was given three days' notice within which to present and prove her claim in the interpleader suit and as proof of her claim required depositions and production of testimony and evidence from New York, she was not afforded an opportunity of being heard (R. 16).

When petitioner applied to the Connecticut Court for a continuance, or, in the alternative, that the decree direct payment of the fund to the assignee and leave open the issues involved in the action in the District Court as to whether the assignment was in fraud of creditors, the respondents' counsel assured the Connecticut Court of the assignee's financial responsibility (R. 14, 15), and the Connecticut Court directed that payment be made to the assignee (R. 7, 8). Respondents are thereby estopped from contending that the decree was intended to and did foreclose the issues in this action.

ARGUMENT.

I.

The Connecticut action was in personam and not binding on petitioner because of lack of service of process on her in Connecticut.

Petitioner was a resident of New York and was served in New York by mail (R. 12). The action instituted by the Hartford-Connecticut Trust Company in the Superior Court in Connecticut was brought under a Statute permitting the institution of an interpleader action (R. 6); it prayed for a judgment requiring the defendants in the

action to interplead (R. 13); the final decree directed the payment and delivery of the property to one of the defendants and discharged the stakeholder from liability (R. 7, 8); the parties considered the action as one of interpleader and so did the District Court.

Interpleader is *in personam* and there seems to be no authority to the contrary. *New York Life Insurance Company* v. *Dunlevy*, 241 U. S. 518; *Hanna* v. *Stedman*, 230 N. Y. 326.

> "No case has been cited by counsel and I have found none which expressly holds that in an interpleader action involving a *res* or specific fund substituted service may be made."
>
> Opinion of Goddard, *J.*, below (R. 9).

Though in the Code States and in the Federal Courts there is only one form of action, actions must still be differentiated one from the other. There are still the same differences as before between an action to quiet title and one of interpleader, for example. No form of test can be phrased to determine which are *in rem* and which are *in personam*. Historically and by precedent certain types of actions are *in rem* and others are *in personam*. Interpleader is in the latter class.

The Courts below laid stress on the fact that the interpleader involved a *res* in the hands of the Connecticut plaintiff and therefore the action was *in rem*. It is submitted that

1. Every interpleader involves a *res* in the hands of the plaintiff and in spite of that is *in personam*, as this Court held in *New York Life Insurance Company* v. *Dunlevy*, 241 U. S. 518.

2. While in a *rem* action there must be a *res*, the existence of a *res* does not make every action involving a

res one *in rem*. This is perfectly illustrated by the *Dunlevy* case where the identical *res* which this Court held gave the Pennsylvania Court jurisdiction *in rem* in an attachment proceeding, did not give it jurisdiction *in rem* in an interpleader suit.

The insurance company in that case became liable for $2,479.70 which was claimed by one Gould in Pennsylvania and by his daughter, Mrs. Dunlevy in California. A creditor of the daughter attached the fund in Pennsylvania. The insurance company asked the Court to interplead Gould and Mrs. Dunlevy and the latter was served in California but did not appear. The insurance company paid the money into Court and after trial it was determined that there was no valid assignment to Mrs. Dunlevy and the fund was therefore paid over to Gould. In an action instituted by Mrs. Dunlevy against the insurance company in California this Court held that the interpleader proceeding was *in personam* and as no service of process on her was made in Pennsylvania, was void.

> "Beyond doubt, without the necessity of further personal service of process upon Mrs. Dunlevy, the Court of Common Pleas at Pittsburgh had ample power through garnishment proceedings to inquire whether she held a valid claim against the insurance company and if found to exist then to condemn and appropriate it so far as necessary to discharge the original judgment. Although herself outside the limits of the State such disposition of the property would have been binding on her. *Chicago, R. I. & P. Ry.* v. *Sturm*, 174 U. S. 710; *Harris* v. *Balk*, 198 U. S. 215, 226, 227; *Louis. & Nash. R.R.* v. *Deer*, 200 U. S. 176; *Balt. & Ohio R.R.* v. *Hostetter*, 240 U. S. 620; Shinn on Attachment and Garnishment, Sec. 707. See *Brigham* v. *Fayerweather*, 140 Massachusetts, 411, 413. But the in-

terpleader initiated by the company was an altogether different matter. This was an attempt to bring about a final and conclusive adjudication of her personal rights, not merely to discover property and apply it to debts."

New York Life Ins. Co. v. *Dunlevy*, 241 U. S. 518, 520, 521.

"There is no authority so far as we are aware holding that an action of interpleader is one *in rem*, but exactly the opposite view has been entertained. (*N. Y. Life Ins. Co.* v. *Dunlevy*, 241 U. S. 518, 521, 522.)"

Hanna v. *Stedman*, 230 N. Y. 326, 335.

The key to the reason that interpleader is *in personam* may be the statement contained in the last two sentences in the quotation from the *Dunlevy* case. Interpleader is a device to relieve a stakeholder from liability but its essence is the determination of the rights of the claimants between themselves. The litigation between the claimants is one to secure an adjudication of their personal rights.

The Federal Interpleader Act was enacted just because interpleader was *in personam* and a stakeholder therefore could not secure an adjudication by State Court interpleader that would protect him when he was unable to acquire personal jurisdiction over a non-resident claimant.

"*New York Life Ins. Co.* v. *Dunlevy* (1916), 241 U. S. 518, exhibited the serious problems encountered by insurance companies when conflicting demands are made by residents of different States. There two individuals, residents of California and Pennsylvania, claimed the surrender value of a life

policy. The insurer unsuccessfully sought through interpleader proceedings in Pennsylvania to secure release from all liability.

In order to mitigate the difficulties, Congress, by the Act of February 27, 1917, 39 Stat. 929, authorized insurance companies to file bills of interpleader in District Courts of the United States. An amendment followed February 25, 1925, 43 Stat. 976, U. S. C. A. 28, S. 41 (26). And the Act of May 8, 1926, 44 Stat. 416, U. S. C. A. 28, Supp., S. 41 (26) (in the margin), rewrote and amplified the provisions of the earlier enactments."

Sanders v. *Armour Fertilizer Works,* 292 U. S. 190, 194.

The case presents no difficulty if precedent is followed, and such difficulty as the District Court found was presented by the case is because of the attempt to reason from analogy in determining the nature of the Connecticut action instead of following the well-established rule that interpleader is *in personam.*

II.

The adjudication in the Connecticut suit was not res judicata of the issues involved here.

The Connecticut decree is not a bar to the prosecution of this action. For the purposes of discussing the application of the doctrine of *res judicata,* we assume that the Connecticut Court had jurisdiction by service of process in Connecticut.

A classic statement of the rule of *res judicata* was set forth in *Cromwell* v. *County of Sac,* 94 U. S. 351. The rule has two branches. This case is governed by the

second branch under which an adjudication is a bar only to the extent of the precise point litigated and determined, when the question comes up in a second action for a different cause of action than was involved in the first suit. *Radford* v. *Myers*, 231 U. S. 725; *United Shoe Machinery Co.* v. *United States*, 258 U. S. 451; *Myers* v. *International Co.*, 263 U. S. 64.

An interpleader action is essentially a litigation between the claimants, and they may be considered as plaintiff and defendant respectively. The assignee asserted his title under the assignment. He was, in effect, the plaintiff in that action. Petitioner in this action sets forth her right of action on the ground that the assignment was in fraud of creditors. The second action is on a different cause of action than was involved in the first suit. In that suit, petitioner's cause of action was neither litigated nor determined and the adjudication is not a bar.

The doctrine finds application in many cases, including the following in New York:

Schuylkill Fuel Corp. v. *Niebert Realty Corp.*, 250 N. Y. 304;
Wille v. *Maier*, 256 N. Y. 465;
Marine T. Corp. v. *Switzerland G. Ins. Co.*, 263 N. Y. 139;
Sielcken-Schwarz v. *American Factors*, 265 N. Y. 239.

Though defenses which could have been asserted are barred, a counterclaim or set-off is not barred because it is a separate cause of action from the plaintiff's cause of action. A counterclaim or set-off may be asserted or not at the defendant's option, and if not asserted may be made the subject of a second action and is not barred by the adjudication in the first action. Petitioner's right to relief was not a defense to the assignee's right under the

assignment. Petitioner's cause of action does not deny the assignee's title. It admits the title and seeks to have it set aside. It is a counterclaim and would be asserted as such in litigation between them.

In *Virginia-Carolina Chemical Co.* v. *Kirven*, 215 U. S. 252, a seller had recovered judgment on a note for the price of fertilizer. The buyer later sued the seller for damage to his crops caused by using the fertilizer. It was held that the prior judgment is not a bar.

> "Of course, as contended by the Chemical Company, there are some defenses which are necessarily negatived by the judgment—are presumed never to have existed. These are such as go to the validity of the plaintiff's demand in its inception or show its performance, such as is said in *Cromwell* v. *Sac County, supra*, as forgery, want of consideration or payment. But this court has pointed out a distinction between such defenses and those which though arising out of the transaction constituting plaintiff's claim, may cut it down or give rise to an antagonistic demand. Of such defenses we said, speaking through Mr. Justice Holmes in *Merchants' Heat & Light Co.* v. *Clow & Sons*, 204 U. S. 286, 290, that the right to plead them as a defense 'is of modern growth, and is merely a convenience that saves bringing another suit, not a necessity of the defense.' And showing how essentially they were independent of the plaintiff's demand, although they might be of a defense to it, it was said that when the defendant set them up he became a plaintiff in his turn and subject to a jurisdiction that he otherwise might have denied and resisted. The principle was applied to recoupment as well as to set-off proper. Even at common law, it was said (p. 289), 'since the doctrine has been

developed, a demand in recoupment is recognized as a cross demand as distinguished from a defense. Therefore, although there has been a difference of opinion as to whether a defendant by pleading it is concluded by the judgment from bringing a subsequent suit for the residue of his claim, a judgment in his favor being impossible at common law, the authorities agree that he is not concluded by the judgment if he does not plead his cross demand, and that whether he shall do so or not is left wholly to his choice'."

Virginia-Carolina Chemical Co. v. *Kirven,* 215 U. S. 252, 257, 258.

Petitioner never had or claimed to have any title or interest in the corpus of the trust property. She had merely a right of action to have the assignment set aside. The bank could have paid to the assignee in perfect safety and without an interpleader decree. The bank indeed had no right to withhold payment. Though not binding here, the New York Banking Law, Sec. 239, subdivision 5, illustrates that and provides that notice to a bank of an adverse claim to a deposit standing to the credit of another person does not require the bank to recognize the claim unless a restraining order is obtained by the adverse claimant.

If the bank had paid, it would not have affected petitioner's right as against the assignee. Instituting the interpleader action, which was unnecessary, and joining petitioner, which was likewise unnecessary inasmuch as she had no claim to nor interest in the fund, cannot affect her rights as against the assignee.

Two New York cases are closely in point. In *Jasper* v. *Rozinski,* 228 N. Y. 349, a parcel of real property had been transferred and a mortgage given back by the buyer to the seller and the mortgage was then assigned. A

creditor sued to set aside the transfer of the property and the assignment of the mortgage as a fraud on creditors. After issue was joined an action was brought to foreclose the mortgage, and the creditor was made a party defendant but failed to appear. The foreclosure went to judgment and the judgment was then set up by supplemental answer in the creditor's suit. The Court of Appeals held that it was not *res judicata* of the issues involved in the creditor's suit. The Court said,

> "We have presented to us, therefore, the simple question whether the plaintiff, a judgment creditor of Krulewitch, who duly commenced a judgment creditor's action to set aside conveyances including a mortgage and an assignment thereof, which were in fact given to hinder, delay and defraud the plaintiff in the collection of his judgment, is prevented from continuing the action to judgment, because he failed, as a defendant in the foreclosure action mentioned, to appear and affirmatively allege and establish the fraud in that action."
>
> • • • • •
>
> "Even if we assume that it would have been a proper issue if tendered for determination in the foreclosure action, the plaintiff's claim of fraud in the transfers as stated was neither tendered as an issue, litigated, nor in any way determined by that action. (*Merchants Bank* v. *Thomson,* 55 N. Y. 11.)"
>
> • • • • •
>
> "The judgment in the foreclosure action did not purport to adjudge the validity of the mortgage as against the plaintiff herein and did not estop the plaintiff from pursuing his remedy in this action. (*Valentine* v. *Richardt,* 126 N. Y. 272.) He may as against the defendant Rozinski, one of the fraudu-

> lent transferees, follow the proceeds of sale and treat the same as having taken the place of the real property on which the mortgage was an apparent but fraudulent lien."
>
> Pages 356, 358, 359.

In *Slote* v. *Cascade Holding Corp.*, 276 N. Y. 239, a mortgage had been executed on realty. When it was subsequently paid the mortgagor procured its assignment to a dummy corporation. An action was later brought to foreclose the mortgage. During the pendency of that action a trustee in bankruptcy was appointed for the mortgagor and the trustee, on his own motion, was given leave to intervene. He failed to do so however. The trustee then brought an action to set aside the assignment of the mortgage. The Court held that the judgment in foreclosure was not a bar to the action and said:

> "The trustees in bankruptcy became parties to the foreclosure action though no claim was asserted there against them because they wished to assert in that action a claim to the mortgaged premises superior to the claim of the plaintiff in the foreclosure action. That claim has never been litigated; the judgment in the foreclosure action established no rights inconsistent with the assertion now of that claim, and is not an adjudication of that claim. *Schuylkill Fuel Corporation* v. *B. & C. Nieberg Realty Corporation, supra. Jasper* v. *Rozinski, supra,* presented the same problem that is here presented, and our decision there is controlling."
>
> Pages 245, 246.

The Connecticut Court did not attempt to determine the issues involved in this action. It merely held that the assignee had title by assignment and so directed payment

to him. It did not determine that the title could not subsequently be set aside. It merely adjudicated

> "that the plaintiff pay and turn over and deliver said property to the defendant Harry N. Wessel and that said plaintiff thereupon be discharged of all further liability to any and all the defendants thereto and that the plaintiff be allowed his costs, etc." (R. 7, 8).

III.

The Connecticut Court did not afford petitioner an adequate opportunity of being heard.

Service of process was made on petitioner by mail in New York on August 22nd, 1944 (R. 7). That process was for the purpose of permitting her to appear in the Connecticut action. We do not complain that there was no opportunity of appearing. A claimant, however, does not have to appear if she has no desire to object to the entry of an interlocutory decree directing interpleader. After such decree has been made she may then file and prove her claim.

The interlocutory decree was made on October 16th, 1944 and a direction made that claims be filed and proved on October 20th, 1944 (R. 16). Notice of this was given to her by the Clerk of the Superior Court on October 16th, 1944 by mail. In order to prove her cause of action, depositions would have to be taken and witnesses and records from New York would be needed (R. 13, 14). The three day notice was totally insufficient.

Though the cases deal with notice of the commencement of an action, an essential part of due process is an adequate opportunity of being heard, and that was not afforded to the petitioner here.

Roller v. *Holly,* 176 U. S. 398;
Londoner v. *Denver,* 210 U. S. 373;
Twining v. *New Jersey,* 211 U. S. 78;
Honeyman v. *Hannan,* 302 U. S. 375;
Pittsburgh etc. Railway Co. v. *Backus,* 154 U. S. 421.

IV.

Respondents were estopped from contending that the Connecticut decree foreclosed the issues involved in this action.

On October 20th, 1944 petitioner's counsel appeared before the Connecticut Court and requested a continuance, or, in the alternative, that the Connecticut decree merely direct payment of the funds to the assignee and leave open the issues involved between petitioner and the assignee in the action then pending in the District Court. Respondents' counsel thereupon informed the Connecticut Court that the assignee was amply responsible (R. 13-15). The Connecticut Court on the same day made a decree directing payment of the fund to the assignee and made no adjudication with respect to the issues involved in this action (R. 7, 8). By their assurance to the Connecticut Court, which must have been intended to influence the action of the Court in denying the request for a continuance, and which apparently was in acquiescence with the request of petitioner's counsel that the issues involved in this action be left open, the respondents should be estopped from contending to the contrary.

The Circuit Court of Appeals commented on this argument to the effect that there is nothing before it to indicate that the action of petitioner was influenced by that statement made to the Connecticut Court (R. 21). It is urged, however, that a continuance might have been

granted had the statement not been made, and that the Connecticut Court denied the application for the continuance because the statement was made and because it intended to limit its adjudication. The statement of respondents' counsel to the Connecticut Court could only be relevant on the assumption that petitioner's rights would not be affected.

It is respectfully submitted that the petition should be granted.

SIDNEY S. BOBBÉ,
Attorney for Petitioner.

BENJAMIN LEIBOWITZ,
Of Counsel.

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Respondents.

Respondents' Brief in Opposition to Petition for Writ of Certiorari.

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CHARLES FRANCIS ROGERS, HELEN RUSSELL ROGERS and HARRY N. WESSEL,

Respondents.

Respondents' Brief in Opposition to Petition for Writ of Certiorari.

Statement of Matter Involved.

The petition for certiorari presents but a fragmentary outline of the facts. We believe a more comprehensive presentation will assist materially in the consideration of the problem *sub judice.*

Facts.

The material facts which are not in dispute, briefly summarized, are as follows:

In 1928, one Samuel Russell, died a resident of the State of Connecticut. Pursuant to his will, admitted to probate in that State, separate trusts were created for the lives of Burton Stubbings and Mary Cashman. Upon the death of these respective life beneficiaries, the corpus of each trust was to revert to certain remaindermen, among whom was respondent Mrs. Rogers (R., p. 2). The Hartford-Connecticut Trust Company, a Connecticut banking corporation, with offices in the City of Hartford, State of Connecticut, was named testamentary trustee. It duly qualified in that capacity and acted as such. *The trusts have always been administered in the State of Connecticut, where the property constituting the trust corpus was physically located* (R., p. 2) *and continuously thus located until the judgment at bar.*

On November 2, 1935, Mrs. Rogers, for valuable consideration, assigned her remainder interests in the Russell trusts, to respondent Mr. Rogers. This assignment was filed with the Trustee immediately thereafter (R., p. 2).

In December, 1943, Mr. Rogers in turn assigned this interest to respondent Mr. Wessel, which assignment was duly filed with the Trustee (R., p. 2).

In 1940, or approximately five years after her said assignment to Mr. Rogers, Mrs. Rogers filed a voluntary petition in bankruptcy in the United States District Court, Southern District of New York. In said proceedings, petitioner herein was appointed Trustee in Bankruptcy. In that capacity she thereafter filed a written notice with The Hartford-Connecticut Trust Company, to the effect that the assignment from her bankrupt to Mr. Rogers was fraudulent as against creditors, and that she claimed to be the owner of Mrs. Rogers' remainder interests in the trusts (R., p. 2). (The present action is to declare said assignment from Mrs. Rogers fraudulent and void).

In 1944, a judgment was recovered against Mrs. Rogers upon which one John Sheehan was appointed Receiver in Supplementary Proceedings in the Supreme Court of the State of New York. Mr. Sheehan likewise filed a claim with The Hartford-Connecticut Trust Company to Mrs. Rogers' interests in the trusts, upon the ground that the assignment to Mr. Rogers was void (R., p. 3).

In 1944, both life tenants of said trusts died (R., p. 3). The Trustee then had in its possession, property consisting of securities and other assets which constituted the trust corpus (R., pp. 3, 32). It was ready to distribute it to the person entitled thereto. Claims having been filed with it by Wessel, by petitioner and by Mr. Sheehan, the Hartford-Connecticut Trust Company was in doubt as to who of these three persons had legal title to said corpus. In 1944, it instituted an equitable action of interpleader in the Superior Court of Hartford County, State of Connecticut. Plaintiff in said action was The Hartford-Connecticut Trust Company, as Trustee. Defendants therein named were petitioner herein, as Trustee in Bankruptcy, respondents Mrs. Rogers, Mr. Rogers and Mr. Wessel, and John Sheehan, as Receiver in Supplementary Proceedings of Mrs. Rogers (R., p. 32). In short, all of the parties to the action at bar were parties in the Connecticut suit. The defendants therein named, Mrs. Rogers, Mr. Wessel, the Trustee in Bankruptcy, and John Sheehan, as Receiver, were non-residents of the State of Connecticut. Service of process in said action was made upon them constructively through registered mail pursuant to Connecticut statutes permitting such procedure. Rogers and Wessel appeared by attorney in said action. Petitioner and Receiver Sheehan did not appear and were defaulted.

The Connecticut action proceeded to trial and judgment was rendered on October 20, 1944, which in effect adjudged that Wessel had title to the trust corpus, and directed The Hartford-Connecticut Trust Company to pay

and deliver the properties constituting the trust funds to him (R., p. 32). No appeal has been taken from said judgment. An exemplified copy of all the proceedings in the Connecticut action is in this record (R., pp. 32, *et seq.*). The affidavit of Arthur E. Howard, Jr., a Connecticut attorney and former Judge of the Connecticut Court of Common Pleas, sets forth in detail all the proceedings taken in the Connecticut suit (R., pp. 25-31). Indeed, petitioner does not gainsay that the Connecticut judgment was rendered in strict compliance with the Connecticut statutes.

Respondents then amended their answers to the complaint at bar by interposing affirmative defense of *res adjudicata* predicated upon the Connecticut judgment. The validity of this defense was sustained on respondents' motion for summary judgment and the complaint dismissed in the District Court (59 Fed. Supp. 986) and affirmed in the Circuit Court of Appeals (152 Fed. 2d, 428).

Summary of Respondents' Argument.

1. Since the corpus of the Russell trusts was physically located in Connecticut, the courts of that State had the power to adjudicate the question of title thereto, and for that purpose, solely, could legally acquire jurisdiction over non-resident claimants to the corpus, by constructive service of process.

2. Petitioner's contention that the Connecticut suit being one in interpleader, is *in personam*, and that jurisdiction over her could not be constructively obtained, is fallacious. The decision of this Court in *N. Y. Life Ins. Co.* v. *Dunlevy* is inapposite to the facts at bar.

3. The issues in the action at bar were necessarily determined in the Connecticut suit.

4. Petitioner's contention that respondents are estopped from urging the defense of *res judicata,* is specious.

5. Petitioner's complaint that she was not afforded an adequate hearing is frivolous.

POINT I.

Since the corpus of the Russell trusts was physically located in Connecticut, the courts of that State had the power to adjudicate the question of title thereto, and for that purpose, solely, could legally acquire jurisdiction over non-resident claimants to the corpus, by constructive service of process.

Petitioner is not a resident of Connecticut. Service of the writ and complaint in the Connecticut suit was made by mailing copies thereof by registered mail to her at her New York City address. The Connecticut Court expressly found that petitioner had actual notice of the pendency of the suit (R., p. 32). The exemplified copy of the Connecticut judgment (R., pp. 32, *et seq.*) details the method of service, which was in strict compliance with Connecticut statutes and was sufficient under Connecticut law to confer jurisdiction over petitioner upon the Superior Court (R., pp. 28, 29).

Since service of the summons in the Connecticut action was not made upon petitioner personally in that State the Superior Court had no jurisdiction sufficient to warrant a personal judgment against her. But the judgment in review was not personal. It merely determined title to a fund physically located in that state. Service of the writ herein was constructive. Constructive service is legal and sufficient to confer jurisdiction where the action in which the process issues, is one generally classified *in rem* or *quasi in rem*. The Connecticut suit

would be *in rem* or *quasi in rem* if it affected property or a fund within the territorial jurisdiction of the Connecticut courts and if the judgment of the Superior Court was confined to determining title to that property or fund and did not attempt to render a judgment against petitioner personally.

In Freeman on Judgments, 5th Edition, a classic treatise on the subject, it is stated in Vol. I, page 706:

> "But notice by publication is restricted in its legal effect and cannot be made available for all purposes. It will enable the court to act insofar as the subject of the proceeding is within the limits and therefore under the control of the state. For all property within a state is subject to the jurisdiction of its courts, and they have the right to adjudicate title thereto, to enforce liens thereupon and to subject it to the payment of the debts of its owners, whether resident or not.
>
> "It must be confessed that it is somewhat difficult, upon principle, to reconcile this statement with the rule that a court has no jurisdiction over persons who are neither citizens nor residents of the state whose tribunal it is. This difficulty has been solved by regarding as *quasi* proceedings *in rem* all actions or proceedings the direct object of which is to affect the title upon property * * *."

See also, Cooley's Constitutional Limitations, 8th Edition, Volume 2, Pages 854, 855.

An examination of the exemplified copy of the Connecticut judgment shows the action to have been *quasi in rem*. The Hartford-Connecticut Trust Company as Trustee had in its physical possession in the State of Connecticut since 1928, the date of Samuel Russell's death, the corpus of the trusts. The Trustee has been and is located in the

State of Connecticut. The trust funds since 1928 have been physically kept in Connecticut. The trusts have always been administered under the Connecticut laws.

Paragraph "1" of the complaint in the Connecticut suit states that the "Trustee holds property on hand for distribution to the remaindermen of said trusts as provided in the Will."

Paragraph "3" recites that Mrs. Rogers assigned her interest in said trust funds to Mr. Rogers.

In Paragraph "4" it is alleged that Mr. Rogers reassigned his interest to Mr. Wessel.

The prayer for relief requests that the defendants be required to interplead concerning their claims "in reference to the property now in the hands of this plaintiff" and that upon payment of the "balance of the property now in the plaintiff's hands" to the person entitled, that plaintiff be discharged from all liabilities (R., p. 32).

The judgment recites that the action was brought to require the defendants to interplead together "concerning their respective right to certain property in the hands of the plaintiff as Trustee under the Will of the late Samuel Russell" and directs that the Trustee "pay and turn over and deliver said property to the defendant Harry N. Wessel", and further allows plaintiff costs "payable out of said property" (R., p. 32).

It will be observed that the judgment contains no personal direction insofar as petitioner is concerned and has no reference to any of her personal rights as distinguished from her claim to the trust funds. All this judgment did was to determine that with respect to the specific trust funds in the State of Connecticut, only Wessel had title thereto.

Thus we have the situation here presented of specific trust funds physically located in Connecticut, with respect to which the Trustee in the Connecticut action requested an adjudication of its rights and those of the claimants

to the fund. The Connecticut judgment is therefore *quasi in rem* and not *in personam*. It directs the delivery of the trust corpus to Wessel. It makes no personal adjudication against petitioner.

Actions *quasi in rem* have been variously defined, but every definition of that term embraces the Connecticut suit.

See:

L. R. A. 1918 F, at page 610;
Freeman, *supra*, Volume 1, Page 706; Volume 3, Page 3124.

Since the Connecticut suit was *quasi in rem*, service of the summons upon petitioner constructively in accordance with the Connecticut Statutes, conferred jurisdiction over her upon the Superior Court, sufficient to determine any claim of title by her against the trust corpus, which was the limit of the Connecticut judgment, and beyond which it did not go.

In Freeman, *supra*, Volume 3, Section 1373, Pages 2840, 2841, it is said:

> "By the aid of process served beyond the state, either personally or constructively, partition may be made, * * * liens may be foreclosed, fraudulent transfers vacated, specific performance of contracts of sale enforced, *conflicting claims of title determined* * * *." (Emphasis supplied.)

In 126 A. L. R., at page 664, it is said:

> "But where the suit has relation to a status, thing or property in the state, or is one * * * in which is sought an adjudication of the title to or interest in the property in the state of its alleged

owner or claimant, it is a suit *in rem* or *quasi in rem;* and in suits *in rem* or *quasi in rem,* personal service is not necessary and may be constitutionally dispensed with and constructive service by publication may be made if authorized by statute."

Accord: *Parker* v. *Kelley,* 166 Fed. 968, 971.

Freeman, *supra,* Volume 3, Section 1530, Page 3140; Section 1378, Page 2850.

The case of *First Trust Co. of St. Paul* v. *Matheson, et al.,* 187 Minn. 468, 246 N. W. 1, appears to be in point. There the plaintiff was a Trustee of an express trust in St. Paul, Minn. where the trust fund had been administered. Defendants were residents of the State of California and contended that the trust was invalid, threatening to hold plaintiff Trustee personally responsible for any income paid out. The Trustee instituted an action in a Minnesota court against the non-resident defendants, in which judgment was prayed, establishing the validity of the trust, confirming plaintiff's title thereto and excluding defendant from any right, title and interest therein. Service of the summons was made upon the California defendants, constructively. The Court said in sustaining such service (246 N. W. 1, 5):

"Here is property, the bearer bonds and cash item, not only localized in this state, not only having a fixed situs herein of long standing, but also subjected by its custodian to the jurisdiction and decree of the District Court. As far back as 1921 the corpus of the trust estate was either brought into or left in this state and by the owner localized just as completely and plainly as though it had all been jewelry or other corporeal personal property. Even though the trust be invalid, there would remain the result of the trustor's acts in placing the

property here. Doubtless securities have been sold and the proceeds reinvested. That is immaterial in view of the fact that the corpus now consists of the bearer bonds and the cash, the whole, in our judgment, of such nature as to have acquired the situs in Minnesota necessary to give the state courts jurisdiction to proceed against or in respect to the property *in rem* or *quasi in rem*.

"A judgment of that kind will not operate against defendants or any of them personally. It will operate on the property to the extent that they have or claim an interest therein. It will either confirm their claims or disaffirming them, exclude them from any right, title or interest * * *."

Another interesting case arose in New York in *Devlin* v. *Roussel*, 36 App. Div. 87. That was an action brought by the beneficiaries of a testamentary trust against an executor residing outside of the State of New York for an accounting of trust funds. Service upon him was made constructively by publication. The subject of the action was a fund in the State of New York, established under the terms of the will and actually put into the hands of the trustee in New York. The court held that even though the action for an accounting might be deemed *in personam*, nevertheless, jurisdiction of the non-resident defendant was properly obtained by constructive service of the summons because of the physical presence of the trust *res* in New York. The court stated at page 89, as follows:

"The object of the present action, so far as Roussel is concerned, is to compel an accounting concerning a fund chargeable, as is claimed, against an estate committed to his hands by a court of New York, and the jurisdiction of the appropriate

courts of this State extends to the settlement of his accounts and the charging of claims against the estate in his hands. The action, although in form *in personam*, as every purely equity suit must be, nevertheless relates to a fund within the jurisdiction of the Supreme Court of New York, and actually within this State, and is *quasi in rem*, if not *in rem*, and the *res* being within the jurisdiction, there is something for a judgment settling rights to operate on. (*Ward* v. *Boyce*, 152 N. Y. 196.)"

See also, Freeman, *supra*, Volume 3, Page 2850, Section 1378.

The Connecticut suit is in the nature of a bill to quiet title, in which constructive service upon non-resident claimants has generally been sustained. In *Franz* v. *Buder*, 11 Fed. 2d 854, plaintiff was remainderman under a will. Defendant was a trustee, the corpus of the trust consisting of corporate stock. Plaintiff sued to establish an interest in the stock. The life tenants of the trust, who were necessary parties to the action, were non-residents of the State of Missouri, where the action was instituted, and were served constructively with process. At page 858, the Court said, sustaining such service:

"This being primarily a suit to establish plaintiff's remainder interest in the property held by the trustees under the deed of trust and located, we assume, in the City of St. Louis, Missouri, the other necessary parties, who are non-residents of the State of Missouri, could be brought in by constructive service. Of course, no personal decree could be made against them unless they appeared in the suit, but the title to the remainder could be established and determined and the property identified and protected."

In 50 *Corpus Juris*, Section 117, Page 503, it is said:

> "Under statutes authorizing service of process by publication, such service has very generally been held valid and sufficient in actions * * * to quiet title to personal property subject to the jurisdiction of the court. Such an action is not an action *in personam* in which personal service is necessary; and while the decree rendered therein is not strictly a decree *in rem*, it fixes and settles the title to the property in controversy and to that extent partakes of the nature of a judgment *in rem*."

A test frequently applied to determine the validity of constructive service, is whether the judgment that the court might render would be effective without personal action on the part of a non-resident defendant. Although not an appellate court decision, the reasoning in *Gore* v. *Pennsylvania R.R. Co.*, 144 Misc. (N. Y.) 639, at page 642, is persuasive:

> "The test of the power of a state to permit service of process outside of the state that will be effective as a non-resident is as to whether or not the decree or judgment that the court may make will be effective. The judgment sought must be one that operates upon the thing itself. The only basis for the jurisdiction is the fact that the judgment of the court in the action can be executed because the subject of the action is within the state. The action must relate to property in which the non-resident defendant has some title or interest. If the judgment in the action is one that does not relate to the property itself, but requires personal action upon the part of the non-resident, then the court has no power to issue process that will have any binding effect upon the non-resident."

In Freeman, *supra*, Volume 3, Pages 3125, 3126, it is said:

> "Doubtless as a general proposition a court of equity in the exercise of its purely equitable powers acts upon the person and the position has sometimes been taken that without the aid of a statute, it cannot proceed *in rem* or *quasi in rem*. The better view, however, seems to be that even in the exercise of its inherent powers and independent of statute such a court may act *in rem where personal compulsion is not* essential to the effectiveness of its decree." (Emphasis supplied.)

At bar, the Connecticut judgment simply determined that title to the trust was in Wessel. It directed the Trustee to deliver the trust corpus to him. It did not require petitioner to do anything. Its judgment was completely effective without any action on her part.

It should be observed, moreover, that this is not the situation where a quiescent non-resident defendant is forced into litigation in a foreign state. At bar, petitioner filed a claim with The Hartford-Connecticut Trust Company, stating that she claimed title to the trust funds upon the ground that the assignment from Mrs. Rogers was fraudulent. She impliedly invited an action by the Trust Company to determine the validity of her claim. As the District Court well said in granting respondents' motion for summary judgment (R., p. 43):

> "Since notice had been given to the Connecticut trustee by the trustee in bankruptcy that she deemed the assignments from the bankrupt to her husband, and from the husband to the third party to be fraudulent, the Connecticut trustee had the right to go into the Connecticut courts and determine who had title to the remainder of the trust. *In re Whit-*

ney, 113 F. (2nd) 426; *Union Trust Co.* v. *Stamford Trust Co.*, 72 Conn. 86, 43 Atl. 555. The notice to the trustee in bankruptcy that the Connecticut trustee was instituting a suit in interpleader to test the claim that the assignments were fraudulent was an invitation to her to come in and participate in the suit. *Massachusetts Mutual Life Insurance Co.* v. *Grossman*, 4 F. Supp. 990."

POINT II.

Petitioner's contention that the Connecticut suit being one in interpleader, is in personam, and that jurisdiction over her could not be constructively obtained, is fallacious. The decision of this Court in N. Y. Life Ins. Co. v. Dunlevy is inapposite to the facts at bar.

Petitioner argues that all interpleader actions are *in personam* and that therefore jurisdiction over her could be obtained only by personal service of process upon her within the State of Connecticut.

The basic error in this contention is the assumption that because the Connecticut suit is entitled "interpleader", the rights of the parties are governed conclusively and exclusively by the label. But mere nomenclature cannot foreclose an inquiry into the substantial nature of the action. Even in interpleader suits, where the subject of the litigation is a *res* or fund physically located within the state exercising jurisdiction, a decree may validly be entered determining title to the fund as against non-resident claimants upon whom process has been constructively served.

In the Restatement of The Law under the title "Conflict of Laws" at Section 102, Page 157, it is said:

> "A, the bailee of chattel which is in state X, brings an interpleader suit in X, naming B and

C who are making adverse claims to the chattel, as defendants. B is personally served with a process in X, but C is served outside X. Under a statute allowing it to do so, the court may award the chattel to B and bar C's claim to it."

See also, *Devlin* v. *Roussel, supra.*

It is axiomatic that equity generally acts *in personam.* Nevertheless, when a specific fund or *res* has a situs in the state of the forum, an effective decree in equity may be rendered against that *res* without personal jurisdiction of the parties. Witness the host of partition suits, foreclosures of mortgages and actions to quiet title, all equitable in nature. Yet the presence of the *res* affords jurisdiction to render judgment even against non-resident defendants. See Freeman, *supra,* Volume 3, Section 1522.

Petitioner has cited no contrary authority and we have discovered none.

Great stress and reliance has been placed by petitioner upon the case of *New York Life Insurance Co.* v. *Dunlevy,* 241 U. S. 518.

This Court held there that the defense of *res judicata* could not be sustained because the Pennsylvania action of interpleader was *in personam* and there had not been personal service of process in that state.

The *Dunlevy* case is clearly distinguishable from the one at bar, because here there existed a fund or *res* in Connecticut, consisting of the Russell trusts, and the Superior Court in Connecticut determined conflicting claims of title to those specific trust funds, but in the *Dunlevy* case, there was no specific fund or *res* which was the subject of the interpleader suit instituted by the New York Life Insurance Co. There was simply a general indebtedness either to Mrs. Dunlevy or to her creditors, or to Gould, whose claim against the insurance company was purely personal and not against any specific *res.* This

distinction is cogent and conclusive. Of course, where there is no *res* physically located within the borders of the State the courts of that State cannot obtain jurisdiction over non-resident defendants by constructive service. As we have seen, it is the presence of the *res* such as in our case, which sanctions jurisdiction by constructive service.

In the *Dunlevy* case, the Circuit Court of Appeals (214 Fed. 1, at Page 8) indicated that there was not even a pretense by the New York Life Insurance Co. of creating a *res* in the interpleader suit by depositing the insurance monies in court before process issued against the non-resident, Mrs. Dunlevy.

In New York, the leading case of *Hanna* v. *Stedman*, 230 N. Y. 326, followed the *Dunlevy* decision, but in the *Hanna* case, also involving an insurance company, there likewise existed no *res* or fund in New York which would justify an order of publication against a non-resident defendant. It is noteworthy that on Page 330 of the report, the Court of Appeals said:

> "The complaint was the ordinary one in which a debtor subjected to conflicting claims and uncertain which is the superior one seeks to compel the contestants to litigate their rights and prays that he be relieved *on payment of his debt* to the successful one. *As a matter of fact, the monies due from the association were never brought into court pending the litigation.*" (Emphasis ours.)

The *Hanna* case was distinguished in *Crozier* v. *U. S. Steel Corp.*, 144 Misc. (N. Y.) 727, 728, upon the ground that in that case there was no trust *res* involved, but merely a personal claim or indebtedness.

Significantly, the Court of Appeals in the *Hanna* case, stating that the action was not *in rem* but *in personam*, proceeded to define *quasi in rem*, as follows (p. 335):

> "An action or proceeding *in rem* has for its subject specific property which is within the jurisdiction and control of the court to which application for relief is made. The action proceeds against such specific property and its object is to have the court define the rights therein of various and conflicting claimants. Jurisdictional control of the property affords the basis for service beyond its jurisdiction upon those who may be interested in its disposition. The result of such an action is a judgment which operates upon the property and which has no element of personal claim or personal liability."

The Connecticut action at bar falls squarely within the definition of an action *quasi in rem* or *in rem*, as defined in the *Hanna* case.

Petitioner has referred in her brief to the Federal Interpleader Act. We may observe parenthetically that that Act could not have afforded The Hartford-Connecticut Trust Company an adequate remedy since it may be invoked only where the adverse claimants to the fund are citizens of different states.

> *Security Trust and Savings Bank of San Diego* v. *Walsh*, 91 Fed. 2d 481;
> *Gardner* v. *Schaffer*, 120 Fed. 2d 840.

At bar, petitioner, Wessel, and Receiver Sheehan, are all residents of the State of New York (R., p. 32). Moreover, considerations of other possible remedies, which The Hartford-Connecticut Trust Company might have had, cannot impair the validity of the judgment actually rendered in the Connecticut suit.

POINT III.

The issues in the action at bar were necessarily determined in the Connecticut suit.

Petitioner apparently concedes that the question of title to the trust fund was actually involved in the Connecticut suit and that Wessel had such title. But by some mental legerdermain, she contends that the Connecticut judgment declared that Wessel had only a voidable title, still open to attack in the present suit. The irresistible inference from her argument is that the Connecticut Court rendered a perfectly vacuous and meaningless judgment which in effect held that while Wessel had title, it was voidable and so far as the Connecticut Court was concerned, neither good nor bad. Petitioner is presumptuous in asking this Court to indulge in the inference that the Connecticut Court rendered so inane a decree.

As the Circuit Court of Appeals said at bar:

> "It would be a plain perversion of the Connecticut judgment to say that it did not mean to determine the interests of the defendants in the fund."

Differently expressed, the effect of petitioner's contention, is that the Connecticut Court merely appointed Wessel a stakeholder of the trust funds, in place of The Hartford-Connecticut Trust Company. But the judgment by its terms does not direct The Hartford-Connecticut Trust Company to deliver the property to Wessel *as a stakeholder*. Petitioner should not now be permitted to vary the express terms of the judgment collaterally and by parol. Freeman, *supra*, Volume 2, Page 1626.

More fundamentally, however, petitioner's contention simply flies in the face of the record at bar. The specific, express purpose of the Connecticut suit was to determine

whether Wessel had title for all purposes. In Paragraph "5" of the complaint in that action, it is alleged (R., p. 32):

> "In December (?) 1942, Hilda M. Glasser was appointed trustee in bankruptcy of Helen Russell Rogers, and as such trustee has brought suit in New York claiming that the assignment made by Mrs. Rogers was made at a time when Mrs. Rogers was insolvent, was fraudulent and void as against Mrs. Rogers' creditors, and that as trustee in bankruptcy she is entitled to said one-fourth interest of Mrs. Rogers in the trust funds."

In other words, the very claim of petitioner, which is the basis of this action, was expressly set forth in the Connecticut suit. The complaint there also alleged Wessel's claim and that of Sheehan and requested an adjudication as to which of these claims was valid.

Therefore, when the Connecticut Superior Court rendered judgment in Wessel's favor, it adjudicated with respect to the claim of petitioner as set forth in Paragraph "5" of the complaint and negated the alleged fraud.

Furthermore, as appears from the exemplified copy of the Connecticut judgment, the issue squarely involved in that action was whether petitioner, or Wessel or Sheehan had title to the Russell trust corpus. The court determined that only Wessel had such title and directed the Trustee to deliver the trust funds to him. It was adjudicated thereby that neither petitioner nor Sheehan had title thereto.

Wessel claimed title (as appears from the exemplified judgment roll) through an assignment of the trust funds from Mr. Rogers, whose title in turn was derived from an assignment made to him by Mrs. Rogers, the original owner. The judgment that title was in Wessel necessarily, albeit impliedly, determined that the assignment

from Mrs. Rogers to Mr. Rogers was valid and not fraudulent or void. Otherwise, Wessel could not have legal title. A necessary connotation from the judgment that Wessel had title was that the assignment from Mrs. Rogers to Mr. Rogers was not fraudulent.

Now, what are the issues in the case at bar? Petitioner contends that the assignment from Mrs. Rogers was fraudulent and void and therefore she as Trustee in Bankruptcy of Mrs. Rogers has title to the trust funds.

But this was the very issue necessarily determined in the Connecticut suit, to wit, that the Rogers assignment was not fraudulent and that Wessel had title to the trust funds.

Of course, the Connecticut judgment did not *expressly* adjudicate the issue as to whether the Rogers' assignment was fraudulent, but it is well recognized that the principle of *res judicata* extends not only to issues actually litigated, but to those which were *necessarily* determined in arriving at final judgment. At bar the Connecticut Superior Court could not have granted judgment to Wessel determining that title was in him without adjudicating that the Rogers' assignments on which Wessel's title is based, were not fraudulent, but legal and valid.

Freeman, in his work on judgments, discusses this as follows:

> "Matters which follow by necessary and inevitable inference from an adjudication because the judgment could not have been rendered without determining them are as effectually concluded thereby as though specifically and in terms adjudicated" (Section 693, Page 1465, Vol. II).

Accord,

McCulloch v. *Davenport Savings Bank*, 226 Fed. 309;
Landon v. *Clark*, 221 Fed. 841.

The case of *Rauwolf* v. *Glass,* 184 Pa. St. 237; 39 Atl. 79, is cited with approval by Freeman (Volume 2, Section 692). In that case, A agreed to exchange goods in his store for B's real estate. B instituted an action against A to replevin the goods in A's store and obtained a judgment of replevin in that action. Thereafter, A instituted the present suit to enjoin the enforcement of the replevin judgment, upon the ground that the contract for exchange was fraudulently obtained. B interposed the defense of *res judicata,* based upon the replevin judgment. The court held that this defense was sufficient, on the theory that the prior judgment in favor of B in replevin was a determination that B had title to the goods in A's store and that such determination necessarily implied that the contract of exchange was not fraudulent. In holding that B had title, the court necessarily, although impliedly, passed on the issue of fraud.

The decision of this Court in *Cromwell* v. *County of Sac,* 94 U. S. 351, properly analyzed, effectively supports *respondent's* position. At page 353 of the opinion, it is said:

> "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

We urge here that the second action (to set aside the alleged fraudulent conveyance) was not different from the interpleader suit. True, they differ as to form, but the primary basic issues are identical. In each case the cardinal issue was whether the assignment from Mrs. Rogers to Mr. Rogers was fraudulent, and in each case the claim or demand was the same. This Court, in the *Sac* case, did not consider that the principle therein enunciated applies when the second action differs *in form* from the first. It is only when the other action is "upon a different claim or demand", which is not our case.

In *Schuylkill Fuel Corp* v. *Nieberg Realty Corp.*, 250 N. Y. 304, at Page 308, the late Chief Judge Cardozo said that "an estoppel is not avoided in such circumstances by mere differences of form between the one action and the other."

Absurd results follow the conclusion that differences in form is the legitimate test. Suppose A sues B at law for damages in trespass, claiming that B's fence encroached on A's land. A judgment is rendered for B, holding that there was no actual encroachment. Could A thereafter maintain a suit in equity to enjoin the trespass simply because the actions differ as to form? Clearly not! The first judgment bars the second suit, because the basic issues are identical.

But if we were to assume that the actions at bar do differ, the *Sac* case nevertheless holds that the doctrine of collateral estoppel applies. Even where actions differ, a judgment is a bar as to issues actually determined. Only as to those issues which *might have been* but were not actually determined, is estoppel inapplicable. The test is whether the fundamental issue in both actions was actually decided.

In *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683, 15 Sup. Ct. 733, at page 691, this Court said:

> "The essence of estoppel by judgment is that there has been a judicial determination of a fact and the question always is, has there been such determination, and not upon what evidence or by what means was it reached."

The Connecticut judgment decided that the assignment from Mrs. Rogers was not fraudulent; otherwise it could not have awarded judgment to Wessel, whose title is based on that assignment. This is the identical issue involved in the present suit and it has been effectively determined.

A criterion frequently applied was enunciated in *Schuylkill Fuel Corp.* v. *Nieberg Realty Corp., supra,* at page 308, as follows:

> "The decisive test is this, whether the substance of the rights or interests established in the first action will be destroyed or impaired by the prosecution of the second."

Applying this principle, it is clear that estoppel prevails herein. The title of Wessel established in the Connecticut suit would be completely vitiated by the successful prosecution of the present action.

Petitioner argues that she was not compelled to present her claim in the interpleader suit, since it was in the nature of a counterclaim, and therefore the judgment therein does not preclude her. The essential implications of this contention reveal its fallacy. The very purpose of an interpleader suit is to determine conflicting claims of competing defendants. This purpose would be completely frustrated and the process of the court effectively flouted if these defendants were permitted to default, not submit their claims, and if a judgment in the interpleader would not estop them.

A judgment by default is just as conclusive an adjudication between the parties of whatever is essential to

support the judgment as when rendered after answer and complete contest.

Lockhart v. *Mercer Tube Mfg. Co.*, 53 Fed. Supp. 301;
Third National Bank v. *Atlantic City*, 130 Fed. 751;
Last Chance Mining Co. v. *Tyler Mining Co.*, *supra.*

Nor is the effect of a default judgment in any wise lessened because rendered between co-defendants, where as here the suit is in equity expressly instituted to determine their rights *inter se* to trust funds.

Freeman, *supra*, Volume 1, Pages 927, 928;
Restatement of Laws, Title Judgments, Section 82, Page 385;
Post v. *Thomas*, 180 App. Div. N. Y. 627, 633.

In passing, we advert briefly to petitioner's contention at page 15 of her brief, that the Trust Company could have paid the trust funds "in perfect safety" to Wessel without an interpleader decree. Petitioner however disregards the fact that she had filed a prior written notice with the Trust Company which, in effect, stated that if the company paid the funds to Wessel it would be doing so at its peril (R., p. 2).

We might observe that the petition at bar does not present any novel question, nor does it indicate that the decision of the Circuit Court of Appeals is in conflict with applicable decisions so as to justify a review on certiorari within the intendment of Rule 38 of this Court.

POINT IV.

Petitioner's contention that respondents are estopped from urging the defense of res judicata is specious.

Petitioner argues that she suggested to the Connecticut Court that the decree direct payment to Wessel and leave open the issues in this action; that the attorney for respondents then stated Wessel was amply responsible. To support this assertion, she refers to pages in the record. But this reference is not to any record appearing in the Connecticut judgment and proceeding (R., pp. 32, *et seq.*). It is a reference merely to an affidavit of petitioner's counsel submitted on the motion for summary judgment, which purports to set forth the events which transpired before the Connecticut Court.

Petitioner's argument at page 19 of her brief is based upon hypotheses and conjecture, not on fact.

She argues in effect that because of the alleged statement of counsel, the Connecticut judgment merely appointed Wessel a stakeholder and did not adjudicate the issues in that action. But the judgment does not so state. It adjudicates all the issues in the interpleader suit raised by the petition or complaint of The Hartford-Connecticut Trust Company, among which was the claim of petitioner that the assignment by Mrs. Rogers was fraudulent. It is a final judgment and on the merits.

The intent of the Connecticut judgment is to be gathered from the judgment itself and not from counsel's *ex parte* statements as to what it purported to decree. If it was the intent not to adjudicate the issues in the Connecticut suit on the merits, such intent could easily have been expressed in the judgment. It was not so expressed. Petitioner should not be permitted collaterally to impeach the judgment by parol.

In Freeman, *supra*, Volume 2, Page 1626, it is said:

> "It is the decree or judgment as entered to which the court must look in subsequent collateral proceedings to determine what it adjudges and extrinsic evidence is not admissible to show that it differs from the decree actually pronounced; the remedy for such a difference is a direct proceeding to have it corrected."

POINT V.

Petitioner's complaint that she was not afforded an adequate hearing is frivolous.

Petitioner argues that she had only three days within which to prepare her claim for trial. She errs on the facts. The *summons and complaint* in the Connecticut suit were served upon her on *August 22, 1944,* as appears from her return receipt of the registered mail (R., p. 32). The return day of the writ or summons was September 5, 1944, or *fourteen* days from the date of service.

On October 16, 1944, interlocutory judgment was entered, the hearing was adjourned to October 20, 1944, and petitioner was again afforded an opportunity on that day to prove her alleged claim to the corpus (R., p. 32).

The Superior Court was not required by any Connecticut Statute to allow her even one day to prove any claim. The final hearing could lawfully have been held on October 16, 1944 and final judgment thereupon entered. Connecticut General Statutes of 1930, Section 5503 (R., p. 29). The adjournment was a matter of judicial grace. If petitioner contends that the Superior Court abused its discretion in granting only three days, her appeal lies to the Connecticut courts. Due process was satisfied when petitioner received fourteen days' notice of the institution of the suit by service of the original writ on August 22, 1944.

Any adjournment thereafter was a matter purely of discretion in the local jurisdiction.

In *Hackner* v. *Guaranty Trust Co. of N. Y.*, C. C. A., N. Y. 1941, 117 Fed. 2d, 95; cert. denied 61 Sup. Ct. 835, it is held that so long as a defendant has had service reasonably calculated to give him actual notice of proceedings, requirements of due process of law are satisfied.

Hartford, Connecticut, the seat of the Superior Court, is but three hours' journey from New York City, which is petitioner's abode. Fourteen days' notice was certainly not unreasonable.

Wick v. *Chelan Electric Co.*, 280 U. S. 108;
Goodrich v. *Ferris*, 214 U. S. 71;
Bellingham Bay & Co. v. *New Whatcom*, 172 U. S. 314, 319.

As a matter of fact, however, appellant had *fifty-nine* days, from August 22 to October 20, to prepare for the hearing on her claim.

CONCLUSION.

The Petition for Certiorari Should Be Denied.

Respectfully submitted,

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